



Appellant-plaintiff John A. Bricker d/b/a Cargo Bay Aquatics (Bricker) appeals the trial court's entry of summary judgment in favor of appellees-defendants General Industries Partners, Dale L. Brown, Larry Brown, and James Brown (collectively, General Industries). Specifically, Bricker argues that the trial court erred in determining that his claims against General Industries were barred by the statute of limitations, and it was error to determine that the various causes of action were precluded under the doctrines of collateral estoppel or res judicata. Concluding that summary judgment was properly entered for General Industries, we affirm the judgment of the trial court.

### FACTS

On February 1, 1995, Bricker entered into a lease agreement with General Industries in Michigan City for the purpose of operating his tropical fish store. The lease provided in relevant part as follows:

An option will be allowed to extend the lease for an additional Six Months at a rate of \$3600.00, payable in monthly installments of \$600.00, commencing on August 1, 1995.

Appellant's App. p. 21. The lease also provided that:

Any holding over by Lessee beyond the expiration of this lease without any agreed upon extension shall become a day to day tenancy for which the rental is agreed to be the sum of Thirty-five (\$35.00) per day.

Id. at 25. Shortly after the parties executed the lease, Bricker became delinquent in his rent and utility payments. As a result, General Industries filed a complaint for ejectment against Bricker on April 25, 1995. Following a trial, judgment was entered for General Industries on June 20, 1995. The trial court determined that Bricker "was in breach of contract" and that

the lease had required Bricker to pay rent in advance, which Bricker failed to do. Additionally, the judgment stated that Bricker owed a utility bill in the sum of \$215.46 and that, under the lease, Bricker's right of possession expired on July 31, 1995. As a result, the total judgment entered against Bricker amounted to \$2,215.46. The trial court concluded by stating "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that . . . [General Industries] is entitled to immediate possession of said real property at the expiration of the lease, said date being July 31, 1995." Appellant's App. p. 78-79.

Bricker tendered payment of rents owed, but General Industries did not negotiate the checks. Thereafter, on July 30, 1995, Bricker wrote a letter to General Industries, claiming that he intended to exercise his option to extend the lease for an additional six months. However, on August 7, 1995, General Industries had Bricker ejected from the premises. The next day, Bricker attempted to file a voluntary petition in the United States Bankruptcy Court and a motion to affirm his lease with General Industries, and "requested that the order be entered without notice to [General Industries]." *Id.* at 17. Bricker filed that petition in an attempt to secure access to the premises to care for his fish before they died. In response, the bankruptcy court entered an order declaring that Bricker's emergency motion to affirm the lease would be dismissed within ten days unless Bricker complied with the Federal Rules of Bankruptcy Procedure. Bricker failed to comply with the rules, and his petition for bankruptcy was ultimately dismissed.

At some point following his ejection from the premises, Bricker returned to the store in an effort to save the fish. However, Bricker was arrested by an off-duty Michigan City police officer and the fish subsequently died.

On August 6, 1997, Bricker filed a complaint against General Industries in federal court, alleging numerous causes of action including claims for conspiracy, violation of the automatic bankruptcy stay, fraud, false arrest, wrongful ejection, and malicious abuse of process. On December 12, 1997, the federal court entered the following order sua sponte:

Proceedings were held in open court [on] November 25, 1997, and this court has had time to reflect further on those proceedings and now sets aside the schedule there announced and now replaces [the] same with this order. Those proceedings reflect suggestions by counsel for this plaintiff that errors of fact are contained in this lawyer drawn complaint this mis citation of supporting [sic]. This court and the defendants are entitled to a better drawn complaint drawn by counsel after full compliance with Rule 11 of the Federal Rules of Civil Procedure. Counsel for plaintiff should and indeed must consider the specific cases in this Circuit under Rule 11 of the Federal Rules of Civil Procedure. This complaint is now DISMISSED WITHOUT PREJUDICE with leave of the plaintiff to file a fresh carefully drawn and considered complaint within 30 days.

Id. at 109. Notwithstanding the above directive, Bricker did not file another complaint in federal court. Rather, on February 11, 1999, Bricker filed a complaint in the LaPorte Superior Court, which was virtually identical to the federal complaint. On February 12, 2001, General Industries filed a motion for summary judgment, claiming that it was entitled to judgment as a matter of law because Bricker's claims were barred under the doctrines of res judicata and collateral estoppel. General Industries also alleged that Bricker's claims were barred under the relevant statute of limitations.

Bricker also filed a motion for summary judgment and, following a hearing on July 29, 2005, the trial court granted General Industries' motion. The trial court's order, dated March 1, 2006, provided in relevant part as follows:

2. Plaintiff's complaint for damages stems from events that took place in 1995, yet this cause was not filed until 1999. . . .
3. The two (2) year statute of limitations period was not tolled under the Journey's Account Statute, Indiana Code section 34-11-8. Because the Plaintiff did not diligently pursue his federal suit, as illustrated by his failure to comply with Judge Sharp's Order dated December 2, 1997 requiring refilling [sic] of Plaintiff's complaint within thirty (30) days, the Journey's Account Statute does not save his untimely complaint. . . . Consequently, all of the Plaintiff's claims are barred because he failed to file the instant complaint within the applicable two (2) year statute of limitations period.
4. The Plaintiff's claims are also barred under the doctrine of res judicata. The instant lawsuit stems from a complaint for ejectment that was filed by the Defendants against the Plaintiff in 1995. Judgment was rendered in favor of the Defendants by a court whose jurisdiction was not at issue. A hearing was held, the parties and their counsel were present at the hearing, and the judgment was rendered on the merits. The dispute adjudicated in the former lawsuit was between the same parties that are involved in the present lawsuit. The claims at issue in the instant litigation were determined (breach of contract, wrongful ejectment, conversion, trespass), or could have been determined (civil conspiracy, abuse of process, fraud, violation of due process, lack of timely notice, emotional distress, malicious prosecution), in the prior action. Therefore, all claims alleged in the present complaint are barred from relitigation under the doctrine of res judicata.
5. Plaintiff's claims are also barred under the doctrine of collateral estoppel. The core of the present case is the Plaintiff's contention that he was wrongfully evicted from the premises at 118 Anchor Road, Suite 3, Michigan City, Indiana. Because the LaPorte Superior Court, a court with proper jurisdiction, adjudicated the eviction contention on the merits in Defendants' favor in a lawsuit against the Plaintiff, the Plaintiff is barred from any attempt to relitigate any causes of action arguing the validity of that eviction. . . .

6. The Plaintiff's civil conspiracy claim is inappropriate for the additional reason that there is no independent cause of action for civil conspiracy in Indiana. . . .
7. The Plaintiff's claim for abuse of process additionally fails because Bricker not only received notice, but he filed an Answer, had a hearing, and received a Judgment. It additionally fails because he failed to plead insufficiency of process as an affirmative defense as required by Rules of Trial Procedure, Rule 8(C).
8. The Plaintiff's claim for abuse of process regarding his arrest for trespass also fails because General Industries Partners had a right to possession of the property in question while the Plaintiff did not.
9. The Plaintiff's claim for fraud additionally fails because he failed to properly plead fraud as required under T.R. 9(B).
10. The Plaintiff's claim of violation of due process fails for the additional reason that none of the Defendants are state actors.

Appellees' App. p. 4-6. Bricker now appeals.

## DISCUSSION AND DECISION

### I. Standard of Review

When reviewing the trial court's grant of summary judgment, we apply the same standard as that of the trial court. Summary judgment is appropriate if the pleadings and evidence submitted demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. We construe the pleadings, affidavits, and designated evidence in the light most favorable to the non-moving party, and the moving party has the burden of demonstrating the absence of a genuine issue of material fact. Wilson v. Royal Motor Sales, Inc., 812 N.E.2d 133, 135 (Ind. Ct. App. 2004). Because a trial court's grant of summary judgment comes to us clothed with a presumption of validity,

the appellant must persuade us that error occurred. Id. Nevertheless, we carefully scrutinize motions for summary judgment to ensure that the non-moving party was not improperly denied his or her day in court. Id. If the trial court's entry of summary judgment can be sustained on any theory or basis in the record, we must affirm. Irwin Mortgage Corp. v. Marion County Treasurer, 816 N.E.2d 439, 442 (Ind. Ct. App. 2004).

We also note that the trial court entered specific findings of fact and conclusions of law in its order granting summary judgment for General Industries. While such findings and conclusions are not required, and although they offer valuable insight into the rationale for the judgment and facilitate our review, we are not limited to reviewing the trial court's reasons for granting or denying summary judgment. Bernstein v. Glavin, 725 N.E.2d 455, 458 (Ind. Ct. App. 2000).

## II. Bricker's Claims

Bricker claims that the trial court erred in granting General Industries' motion for summary judgment because the designated evidence failed to establish that the applicable statute of limitations had expired. In essence, Bricker argues that he filed his complaint against General Industries in a timely fashion.

In addressing Bricker's contention, we first note that Indiana Code section 34-11-2-4 provides that "an action for: (1) injury to person or character, (2) injury to personal property; or (3) a forfeiture of penalty given by statute, must be commenced within two (2) years after the cause of action accrues." As noted above, Bricker filed his complaint on February 11, 1999, which asserted numerous causes of action against General Industries. Many of those

counts are necessarily barred by the two-year statute of limitations applicable to tort claims that includes civil conspiracy, fraud, abuse of process, wrongful ejectment/unlawful eviction, conversion, negligence, emotional distress, trespass, and malicious prosecution. See Burkett v. Am. Fam. Ins. Group, 737 N.E.2d 447, 459 (Ind. Ct. App. 2000) (holding that the two-year statute of limitations in accordance with Indiana Code section 34-11-2-4 governs actions that are based in tort).

Bricker's remaining causes of action included counts for breach of contract, lack of notice, and violation of due process. Those claims are likewise barred under the two-year statute of limitations, inasmuch as this court has determined that the "form" of a cause of action is immaterial when considering which statute of limitations to apply. See Small v. Centocor, Inc., 731 N.E.2d 22, 29 (Ind. Ct. App. 2000) (holding that the plaintiff's labels of forgery, active fraud, deceit, constructive fraud, and fraudulent concealment to characterize his claims did not affect that fact that his action sounded in medical malpractice/wrongful death to which a two-year statute of limitations applied). Indeed, our Supreme Court has held that it is the substance of the claim that determines which statute of limitations should apply. Whitehouse v. Quinn, 477 N.E.2d 270, 274 (Ind. 1985).

In our view, the substance of Bricker's action against General Industries involved injury to his person, character, and personal property. Thus, it is the two-year statute of limitations set forth in Indiana Code section 34-11-2-4 that applies to these claims. Hence, we reject Bricker's contention that the alleged existence of a lease between Bricker and General Industries should alter the notion that the substance of Bricker's claim is for

damages to personal property interests and personal and character injuries, rather than an alleged deprivation of the right to use real property. Indeed, Bricker did not assert a claim regarding his use of, or damages to, real property that might have invoked a six-year statute of limitations under Indiana Code section 34-1-2-1.<sup>1</sup> Hence, Bricker's claims stemming from the death of his fish and the remaining alleged personal and character injuries are governed by the two-year statute of limitations for such personal injuries. As a result, the trial court properly determined that the two-year statute of limitations barred Bricker's claims.

Notwithstanding this conclusion, Bricker asserts that the grant of summary judgment for General Industries was erroneous because the Journey's Account Statute, Indiana Code section 34-11-8-1, necessarily precluded dismissal of his causes of action.

The Journey's Account Statute provides:

(a) This section applies if a plaintiff commences an action and:

- (1) the plaintiff fails in the action from any cause except negligence in the prosecution of the action;
- (2) the action abates or is defeated by the death of a party; or
- (3) a judgment is arrested or reversed on appeal.

(b) If subsection (a) applies, a new action may be brought not later than the later of:

- (1) three (3) years after the date of the determination under subsection (a); or
- (2) the last date an action could have been commenced under the statute of limitations governing the original action;

and be considered a continuation of the original action commenced by the plaintiff.

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<sup>1</sup> Claims for the use of real property are subject to a six-year statute of limitations under this statute.

In construing this statute, we observed in Parks v. Madison County, 783 N.E.2d 711, 720 (Ind. Ct. App. 2002), that

The Journey's Account Statute, when applicable, serves to resuscitate actions that have otherwise expired under a statute of limitations. It generally permits a party to re-file an action that has been dismissed for a lack of jurisdiction in one forum can be re-filed in the proper forum. The "new" action is then considered a continuation of the original action for purposes of the statute of limitations. The underlying purpose of the Journeys Account Statute is to preserve the right of a diligent suitor to pursue a judgment on the merits. However, the statute does not afford protection to a suitor who commences an action but it fails due to negligence in the prosecution of the action.

(Emphasis added). Additionally, the purpose of the Journey's Account Statute is to provide for continuation when a plaintiff fails to obtain a decision on the merits for some reason other than his own neglect and the statute of limitations expires while his suit is pending. Kohlman v. Finkelstein, 509 N.E.2d 228, 232 (Ind. Ct. App. 1987). Moreover, a "plaintiff cannot be said to 'fail' within the meaning of this statute unless he makes an unavailing effort to succeed." Pennsylvania Co. v. Good, 103 N.E. 672, 674 (Ind. Ct. App. 1913).

In this case, Bricker filed his complaint in federal court on August 6, 1997, which was within the two-year statute of limitations period—assuming for argument's sake that his cause of action against General Industries accrued on August 7, 1995. However, as the order indicates, there were numerous errors in that complaint, and Bricker failed to promptly refile the complaint as the court had directed him to do. Specifically, as discussed above, the December 2, 1997 order granted Bricker leave to "file a fresh carefully drawn and considered complaint within 30 days." Appellant's App. p. 109-110. Rather than complying with that directive, Bricker waited 436 days and filed a different lawsuit in state court. In our view,

Bricker's failure to follow the court's order clearly demonstrates that he did not diligently pursue his action in federal court. Bricker's failure to file a new complaint within thirty days of the federal court's order shows that he simply abandoned his federal cause of action and waited more than one year before pursuing any additional action against General Industries. Simply put, such a careless approach demonstrates Bricker's negligence in the prosecution of his action, and that negligence precludes him from invoking the Journey's Account Statute.

Finally, we note that Bricker had a duty to pursue his action in federal court by filing a "fresh complaint" pursuant to the court's order of December 12, 1997. Id. at 109. Bricker cannot successfully claim that his federal action "failed" within the meaning of the Journey's Account Statute because he did not make an unavailing effort to succeed in the federal action as the statute contemplates. Thus, Brucker cannot avail himself of the Journey's Account Statute to save the untimely state action. As a result, we conclude that the trial court properly granted General Industries' motion for summary judgment.<sup>2</sup>

The judgment of the trial court is affirmed.

KIRSCH, C.J., and SHARPNACK, J., concur.

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<sup>2</sup> Because we have resolved this case on the statute of limitations issue, we need not address Bricker's contention that the grant of summary judgment for General Industries was erroneous on the bases of res judicata and collateral estoppel.